Supreme Court, U.S.
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NO. 93-1311

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT GEORGE BURCHILL,
Petitioner,

vs.

DOUGLAS KISH, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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BRIEF IN OPPOSITION

HERBERT M. RAFNER
Counsel of Record
HOWARD S. STEVENS
Stevens & Johnson
740 Hamilton Mall
Allentown, PA 18101
(610) 439-1451
Counsel for Respondents,
Healtheast and
Allentown Hospital

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28 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Has a pro se plaintiff-attorney been denied due process where his action was dismissed conditionally, for failure of his complaint to state claims upon which relief can be granted, with leave to plead over, and he failed to file an amended complaint within the delimited time as extended on his motion, and the action was then dismissed with prejudice?

2. Was Petitioner denied due process because his petition for rehearing to the Circuit Court was denied after being submitted to the Judges who participated in the decision of the Court and other available Circuit Judges in regular active service, rather than to all of the Judges in regular active service?

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Statutes and Rules

28 U.S.C. §46(c):

Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with

section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

Local Rules of The United States District Court For The Eastern District of Pennsylvania,

RULE 20. MOTION PRACTICE

(a) Every motion shall be accompanied by a form of order which, if approved by the court, would grant the relief sought by the motion. Every response in opposition to a motion shall be accompanied by a form of order, which, if approved by the court, will

deny or amend the relief sought by the motion.

(b) Every uncontested motion shall be accompanied by a certificate of counsel that such motion is uncontested.

(c) Every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the court directs otherwise, any party opposing the motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. (Note: pursuant to F.R.Civ.P. 6(e), an additional three (3) days shall be allowed if service is made by mail.) In

the absence of timely response, the motion may be treated as uncontested. The court may require or permit further briefing if appropriate.

(d) Every motion not certified as uncontested shall be accompanied by a written statement as to the date and manner of service of the motion and supporting brief.

(e) Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the Court Reporter Coordinator, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion must be dismissed for lack of prosecution.

(f) Any interested party may request oral argument on a motion. The

court may require oral argument, whether or not requested by a party. The court may dispose of a motion without oral argument.

(g) Motions for reconsideration or reargument shall be served within (10) days after the entry of the judgment, order, or decree concerned.

COUNTER-STATEMENT OF THE CASE

Petitioner Robert George Churchill, Esquire, filed a pro se complaint on May 13, 1992, against Respondents Allentown Hospital/Healtheast and fifteen other Respondents. The complaint alleged that these and the other Respondents violated Petitioner's civil rights during a May 13, 1990 arrest of Petitioner, a search of his home, and subsequent hospitalization at Allentown Hospital, he having been brought there by police because there was no bed available at the local state mental institution (Petition, p. 7).

The Petition is devoted to a recital of the reasons Petitioner feels aggrieved by the actions of the several Respondents, but omits a statement of the proceedings in the District Court which culminated in the dismissal of his case. It is those proceedings which are

most pertinent to the merits of the Petition, and are brought to the attention of this Honorable Court herein.

These Respondents filed a motion to dismiss on September 30, 1992. On Oct. 5, 1992, the District Court entered an order directing Petitioner to comply with Local Civil Rule 20 of the United States District Court for the Eastern District of Pennsylvania and file a proper response to Respondent's pending motion and another Respondent's motions. That order provided, "Plaintiff is hereby notified that if a proper response is not filed within twenty-one (21) days of the date of this order, the case will be dismissed by the Court with prejudice".

On November 9, 1992, on Petitioner's motion, the District Court extended the time for filing responses to the pending motions to dismiss and for summary judgment to November 23, 1992.

On December 8, 1992 the District Court entered an order which provided, "Plaintiff is specifically directed to comply with Local Rule Civil 20 of this Court and file proper responses to said motions . . . Plaintiff is hereby notified that if a proper response is not filed within twenty-one days of the date of this order, this case will be dismissed by the court with prejudice."

Motions to dismiss by other Respondents herein were filed. The District Court entered an order on January 5, 1993, again notifying the Petitioner that the case would be dismissed if proper responses to the pending motions were not filed within twenty-one days. On January 15, 1993, upon the Petitioner's further motion to enlarge time, the Court extended the time for compliance to February 5, 1993.

That order provided, "no further extensions will be permitted." Petitioner completed filing the required responses to the motions on or about February 11, 1993.

Respondents' motions to dismiss were granted by order dated February 22, 1993, but conditionally, without prejudice to Petitioner's right to plead over within twenty-one days of the date of the order. Petitioner having moved again to enlarge time, the District Court granted an order dated March 9, 1992 extending the time for the filing of Petitioner's amended complaint an additional twenty-one days. On April 5, 1993, the District Court, observing that no amended complaint was filed pursuant to the order of March 9, 1993, dismissed the case with prejudice. The amended

complaint was filed on April 8, 1993.[1]

On April 21, 1993, Petitioner filed a motion to obtain relief from judgment in the District Court and, on May 5, 1993, filed a notice of appeal to the Third Circuit Court of Appeals. The District Court dismissed Petitioner's April 21, 1993 motion on the ground that the Court was without jurisdiction at that time.

The Third Circuit affirmed the judgment of the District Court by order dated November 12, 1993, and denied Petitioner's motion for rehearing on December 16, 1993. The order sur petition for rehearing dated December 16, 1993 recited that the petition therefor had been submitted to the Judges who participated in the decision of the

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1 The date that the amended complaint was mailed was disputed in the Court below. However, the docket shows that it was filed on April 8, 1993.

Court and the other available Circuit Judges in regular active service.

SUMMARY OF ARGUMENT

Due process in this case is that procedural process consistent with the rules of fair play which have been recognized through the years. There has been no violation of that standard herein. Petitioner has received more than a generous amount of fair play in this case. The order granting the several Respondents' motions to dismiss was not granted upon default, Petitioner having filed his responses thereto after his time for responding was extended several times upon his motions.

The order dismissing Petitioner's complaint for failure to state claims upon which relief can be granted was conditional, in that Petitioner was granted leave to plead over by a date

certain, which he failed to do after several extensions of the delimited time, when the dismissal was made final. That Petitioner was granted leave to plead over, coupled with the many extensions of filing dates he was granted, is convincing evidence that Petitioner was treated not only fairly, but generously.

Due process does not require rehearings. Petitioner was not denied due process merely because the order denying his Petition for Rehearing was submitted to the Judges who participated in the decision of the Court and the other available Circuit Judges of the Circuit in regular active service, rather than to all of the Judges in regular active service. Courts of Appeals may devise their own procedural rules.

ARGUMENT

Petitioner Has Received Fair Play, Equivalent to Due Process

The standard of due process applicable to the instant case is embodied in the rules of fair play which have become associated with various proceedings over the years. Hannah v. Larche, 363 U.S. 420, 4 L.Ed. 2d 1307, 80 S.Ct. 1502, (1960) reh. den., 364 U.S. 855, 5 L.Ed. 2d 79, 81 S.Ct. 33.

Petitioner moved the District Court for extensions of filing dates five times, and, each time, the Court granted those extensions, meanwhile issuing five orders, warning Petitioner to comply with a filing deadline, or the case would be dismissed. This sequence culminated in the grant of the dismissal motions on February 23, 1991 but with leave to serve an amended complaint within twenty-one days. The dismissal

motions were not granted upon Petitioner's default in responding thereto, but upon the merits, after consideration of Petitioner's opposing brief and affidavits.

The Court, on Petitioner's motion, extended the deadline for filing the amended complaint, and did not finally dismiss the action with prejudice until the Petitioner failed to file it on the due date, as extended. These extensions of numerous deadlines to a pro se attorney, can leave little doubt that Petitoner has been treated not only fairly, but generously, cf. Little v. Streater, 452 U.S. 1, 68 L.Ed. 2d 627, 101 S.Ct. 2202 (1981).

Petitioner was not snared by a concealed procedural deadfall. He ignored repeated warnings by the Court until, finally, his case was dismissed. There was no state action which deprived him

of an opportunity to be heard, cf. Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780 (1971).

Petitioner filed his motion to obtain relief from judgment on April 21, 1993, which was denied by the District Court on May 18, 1993, on the ground that it had no jurisdiction because Petitioner had filed a notice of appeal to the Third Circuit on May 5, 1993. Petitioner did not contest the grounds for that order in the Circuit Court.

In contradistinction to Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), Petitioner did not lose in the Circuit Court on a mere technicality. The principal point he raised in his Third Circuit brief was that the denial of his motion for relief from judgment was an abuse of discretion. He did not raise any due process constitutional issue in that Court.

Petitioner had no need to move for leave to amend his complaint, unlike the petitioner in Foman, supra. To the contrary, leave to amend had been granted in the order which dismissed the case.

This case is strikingly different from Foman, supra., with respect to the application of the rules of fair play. Petitioner did not avail himself of the opportunity to timely file an amended complaint, despite the grant, upon his motion, of an extension of the filing date. Petitioner does not assert that there was an abuse of discretion in the form of the denial of any of his motions for extensions of time. There was no such denial. Respondents respectfully submit that there has been no abuse of judicial discretion sufficient to warrant review by this Honorable Court.

There was a dispute in the Court

below as to when Petitioner's amended complaint was served, but it cannot be disputed that it was filed two days after the order dismissing the case with prejudice was entered. F.R.C.P. Rule 5(e) defines filing with the court as filing with the clerk of court, except that the judge may permit the papers to be filed with the judge. Papers are not filed when they are mailed.

It was not a denial of due process by the Courts below to apply the plain meaning of Rule 5(e) by ruling, in effect, that Petitioner had failed to timely file his amended complaint, notwithstanding that it may have been mailed on the due date. Petitioner contended, in his motion to obtain relief from judgment, that he misconstrued the District Court's February 22, 1993 order conditionally dismissing the case as requiring mailing, rather

than filing, the amended complaint. Respondents respectfully submit that there is no due process right to misconstrue either Court orders or the Federal Rules of Civil Procedure.

The Proceedings In The Circuit Court Did Not Deprive Petitioner Of Due Process

"Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing before judgment, if ample, satisfies the demand of the of the Federal Constitution in this respect." 16A Am. Jur. 2d 1080.[2] The

[2] Citing, at footnote 82, Louisville & N.R. Co. v. Higdon, 234 U.S. 592, 58 L.Ed. 1484, 34 S.Ct. 948; United States v. Heinze, 218 U.S. 532, 54 L.Ed. 1139, 31 S.Ct. 98; James v. Appel, 192 U.S. 129, 48 L.Ed. 377, 24 S.Ct. 222; Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 41 L.Ed. 369, 17 S. Ct. 56; Pittsburgh, C., C. & S. L. R. Co. v. Backus, 154 U.S. 421, 38 L.Ed. 1031, 14 S.Ct. 1114.

principal purpose of in banc proceedings is to maintain the integrity of the decisions of the Court of Appeals by assuring that a majority of the judges always control its precedential decisions. The procedure to be followed by a Court of Appeals is left to determination by each Court. United States v. American Foreign Steamship Corporation, 363 U.S. 685, 4 L.Ed. 2d. 1491, 1494, 1495, 80 S.Ct. 1336, rehearing den. 364 U.S. 854 5 L.Ed. 2d 77, 81 S. Ct. 30, on remand (CA2 NY) 291 F.2d 598, cert. den. 368 U.S. 895, 7 L.Ed. 2d 92, 82 S.Ct. 171 and cert. den. 368 U.S. 895, 7 L.Ed. 2d 92, 82 S. Ct. 172.

The fact that Petitioner's petition for rehearing to the Third Circuit was submitted to the Judges who participated in the decision of the Court and the other available Circuit Judges of the Circuit in regular active service,

rather than to all of the Judges in regular active service, is neither irregular nor a deprivation of due process.

28 U.S.C. §46(c), which authorizes hearings and rehearings by the Circuit in banc, is addressed to the Courts of Appeals rather than to litigants; the Courts of Appeals have the power to establish their own procedures relative to the conduct of in banc proceedings, including the discretion to determine what cases to take in banc. Shenker v. Baltimore and Ohio Railroad Company, 374 U.S. 1, 10 L.Ed. 2d 709, 83 S.Ct. 1667 (1963). Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 97 L.Ed. 986, 73 S.Ct. 656 (1953); Mr. Chief Justice Warren expressed the opinion of a majority of the Court on this point as follows:

"The Court had occasion to consider

this section at length in Western Pacific R. Corp. v Western Pacific R. Co., 345 US 247, 97 L ed 986, 73 S Ct 656. It there said: 'In our view, §46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order [374 US 5] hearings en banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.' Id., at 250." Shenker v. Baltimore and Ohio Railroad Company, supra., 10 L ed 2d at p. 713.

There has been no abuse of

discretion amounting to a denial of due process in this case, either by the dismissal with prejudice by the District Court or by the proceedings in the Circuit Court. Petitioner, while appearing pro se, is himself an attorney. Therefore, this is not a case where a party suffered a detriment through an attorney's procedural error, nor a case where a pro se party with a worthy cause, but unschooled in the law, loses out because he or she is entrapped in a procedural morass. Petitioner, like every attorney and every litigant, is chargeable with the knowledge of proper procedure.

CONCLUSION

The Petition has shown no special or important reason for the grant of certiorari and it should, therefore, be denied.

Respectfully submitted,

STEVENS & JOHNSON

HERBERT M. RAFNER, ESQUIRE
Counsel of Record for
Respondents Healtheast
and Allentown Hospital
740 Hamilton Mall
Allentown, PA 18101
(610) 439-1451

HOWARD S. STEVENS, ESQUIRE
740 Hamilton Mall
Allentown, PA 18101
(610) 439-1451